IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 320 OF 1999

1. Anil Hanmant Bhosale)
2. Gangua @ Gangaram Narayan Bhosale)
3. Sunil Hanmant Bhosale ..) Appellants.

versus

The State of Maharashtra .....)Respondent.

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Mr. Navin Chomal for the appellants.
Mrs. U.V.Kejariwal APP for State.

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CORAM ; V.G.PALSHIKAR &
SMT. NISHITA MHATRE, JJ.

DATED; 15TH MARCH, 2005.

JUDGMENT (Per Palshikar, J.)

1. Being aggrieved by the order of conviction recorded by the learned IInd Additional Sessions Judge in Sessions Case No.208 of 1998 on 26-03-1999 the appellants have preferred this appeal on the grounds mentioned in the memo of appeal as also canvassed before us.

2. The prosecution story stated briefly is that on 30-05-1998 the victim went to the field on instructing his wife P.w.3 to bring some food to the field. Accordingly P.w.3 went to the field where the accused were present and there was some altercation on the point of distribution of stolen gold and property.

Then it is alleged that the accused persons assaulted the victim, who as a result of the assault died. Since it was night time the FIR was lodged on the next day. During investigation the accused persons were arrested and duly prosecuted. The prosecution has examined as many as five witnesses to prove its case and on appreciation of that evidence the learned trial Judge came to the conclusion of guilt and sentenced the accused as aforesaid.

3. Immediately after the order of conviction was passed, Criminal Application No.1815/00 was filed in this court claiming re-hearing of the trial on the ground that the accused persons were not given adequate opportunity to put their case before the court. The said application came to be disposed of on the ground that in view of the fact that conviction has already recorded, the proper remedy for the accused persons would be to agitate all these questions in an appeal. It is thereafter the present appeal has been filed.

4. The learned counsel appearing on behalf of the appellants contended that the accused have been seriously prejudiced by violation of provisions of section 273 and 317 of the Cr.P.C. Admittedly the trial was conducted in the absence of the accused persons, which has resulted in material prejudice to the accused persons. Provisions of section 273 read as under:

273. Evidence to be taken in presence of accused:

Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

5. It therefore, lays down that presence of the accused at the time of trial is necessary unless otherwise provided. The normal rule therefore is that trial is to be conducted in the presence of the accused persons. Exception is provided by section 317 of the Cr.P.C. which reads as under:

317. Provisions for inquiries and trial being held in the absence of accused in certain cases.

(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his

attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

6. It is permissible in these provisions that the learned trial Judge should proceed with the trial without the attendance of the accused in court. But he can do so only by recording reasons to that effect. In the present case, there is no such recording of reasons based on which the learned trial Judge could have proceeded with the trial in the absence of the accused.

7. Taking into consideration these provisions of the Code and the fact that they are enacted to provide specifically in law, the principles of natural justice, following which only there can be trial and conviction for a criminal offence. In the absence of these provisions, the trial may not be fair, if it is

conducted in the absence of the accused persons. In the face of these provisions and in the absence of any recorded reasons for dispensing with the presence of the accused it has to be concluded that it has resulted in grave injustice to the accused and the trial is liable to be declared as mistrial. The prejudice caused to the accused persons by their absence is writ large and need not be elaborated. This in our opinion, is a fatal error committed by the prosecution in conducting the trial without presence of the accused. The learned Judge also should have paid attention to this aspect but probably it was not brought to the notice of the learned trial Judge. Since, we are of the view that the trial is liable to be branded as mistrial, we set aside the impugned order and conviction and remit the matter back to the trial court for trial in accordance with the law after keeping in view the provisions of sections 273 and 317 of Cr.P.C. It is desired that the trial will be conducted in accordance with the law and as early as possible. The appeal is thus succeeds and is allowed.

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